

1 services within a single building or complex, which services
2 were substitutable for SCT's services and which provided a
3 revenue base which such SMATV companies might have used to
4 expand to other buildings or complexes and compete with SCT;

5 f. SCT requested from the Commission, and
6 subsequently obtained, agreements permitting SCT to engage in
7 differential and predatory pricing and to enjoy unfair
8 advantages over plaintiff;

9 g. SCT has constructed parts of its cable
10 television system in such a way as to artificially increase
11 plaintiff's costs of installing its own system on the utility
12 poles. Actions by defendant SCT in this regard include, but
13 are not limited to, the installation of its wires unnecessarily
14 high or low on utility poles and alternating between high and
15 low locations on consecutive poles.

16 49. On information and belief, each of the above acts
17 were committed with the specific intent of obtaining,
18 maintaining and/or expanding SCT's market power in the relevant
19 market.

20 50. The above-mentioned violations have directly and
21 proximately caused damage to plaintiff in its business and
22 property in substantial amounts which are as yet unknown, and
23 which will be set forth in full when ascertained.

24 51. The above-mentioned violations have also caused,
25 and will continue to cause, irreparable harm to plaintiff.
26 Unless defendant is enjoined from engaging in said anticompeti-
27 tive actions and threatened actions, plaintiff will continue to
28 suffer great and irreparable harm.

1 WHEREFORE, plaintiff prays for relief as hereinafter
2 set forth.

3 FIFTH CLAIM FOR RELIEF
4 (Sherman Act, Section 2)
5 (Defendants City, County and Commission)

6 52. Plaintiff incorporates herein by reference the
7 allegations of paragraphs 1 through 51 above, and further
8 alleges as follows.

9 53. This claim arises under Section 2 of the Sherman
10 Act (15 U.S.C. §2) and is brought pursuant to §§4 and 16 of the
11 Clayton Act (15 U.S.C. §§15 and 26). The Court has
12 jurisdiction over this claim pursuant to 28 U.S.C. §1337.

13 54. The provision of cable television service
14 involves the conduct of business in interstate commerce.

15 55. The relevant product market here involved is the
16 provision of news, information and entertainment to the
17 subscriber's television set by means of cable.

18 56. The relevant geographic market involved is the
19 geographic limits of the County of Sacramento.

20 57. Beginning at some time unknown to plaintiff, the
21 City, County and Commission, and their conspirators, including
22 defendant SCT, have with specific intent and with a dangerous
23 probability of success engaged in acts which amount to
24 monopolization of, attempts to monopolize, and conspiracy to
25 monopolize the cable television market in the Sacramento area.
26 Said defendants now possess monopoly power, and have
27 consciously maintained and extended it. They threaten to
28 further maintain and extend their monopoly power as above
described.

58. Defendants willfully acquired and deliberately maintained market control not as sovereign, but as entities engaging in a commercial enterprise, i.e. the leasing of real property interests in their rights of ways.

59. The overt acts committed by said defendants in furtherance of the attempts to monopolize and the maintenance of monopoly described above, include, but are not limited to, all of the following:

a. Defendants City, County and Commission included in their Licensing Ordinances burdensome, unreasonable

1 maintaining and/or expanding the City, County and Commission's
2 market power in the relevant market.

3 61. The above-mentioned violations have directly and
4 proximately caused damage to plaintiff in its business and
5 property in substantial amounts which are as yet unknown, and
6 which will be set forth in full when ascertained.

7 62. The above-mentioned violations have also caused,
8 and will continue to cause, irreparable harm to plaintiff.
9 Unless defendants are enjoined from engaging in said
10 anticompetitive actions and threatened actions, plaintiff will
11 continue to suffer great and irreparable harm.

12 WHEREFORE, plaintiff prays for relief as hereinafter
13 set forth.

14 SIXTH CLAIM FOR RELIEF
15 (Sherman Act, Section 1)
16 (All Defendants)

17 63. Plaintiff incorporates herein by reference the
18 allegations of paragraphs 1 through 62 above, and further
19 alleges as follows.

20 64. This claim arises under Section 1 of the Sherman
21 Act (15 U.S.C. §1) and is brought pursuant to §§4 and 16 of the
22 Clayton Act (15 U.S.C. §§15 and 26). The Court has
23 jurisdiction over this claim pursuant to 28 U.S.C. §1337.

24 65. Beginning at some time unknown to plaintiff, and
25 continuing thereafter, defendants and their coconspirators have
26 engaged in and attempted to engage in an unlawful contract,
27 combination and conspiracy in unreasonable restraint of
28 interstate trade and commerce, designed to destroy plaintiff's

1 right and opportunity to successfully operate a cable
2 television system in Sacramento County, in violation of Section
3 1 of the Sherman Act. The contract, combination and conspiracy
4 alleged herein includes a continuing agreement, understanding
5 and concert of action among defendants and their
6 coconspirators, the substantial terms of which have been to
7 attempt to prevent, hinder and restrain plaintiff's entry into
8 and operation in the relevant geographical market through a
9 pattern of threatened and actual anticompetitive acts and
10 statements specifically designed to accomplish this
11 anticompetitive goal.

12 66. Defendants City, County and Commission, in their
13 efforts to restrain competition herein mentioned, have acted
14 not as sovereign, but as entities engaging in a commercial
15 enterprise. i.e. the leasing of real property interests in the

1 70. The above-mentioned violations have also caused,
2 and will continue to cause, irreparable harm to plaintiff.
3 Unless defendants are enjoined from engaging in said
4 anticompetitive actions and threatened actions, plaintiff will
5 continue to suffer great and irreparable harm.

6 WHEREFORE, plaintiff prays for relief as hereinafter
7 set forth.

8 SEVENTH CLAIM FOR RELIEF
9 (State Cartwright Act)
10 (SCT and Commission)

11 71. Plaintiff incorporates herein by reference the
12 allegations of paragraphs 1 through 70 above, and further

1 in said anticompetitive actions and threatened actions,
2 plaintiff will continue to suffer great and irreparable harm.

3 WHEREFORE, plaintiff prays for relief as hereinafter
4 set forth.

5
6 EIGHTH CLAIM FOR RELIEF
(State Unfair Trade Practices)
(SCT and Commission)

7
8 76. Plaintiff incorporates herein by reference the
9 allegations of paragraphs 1 through 75 above, and further
10 alleges as follows.

11 77. This claim arises under the California Unfair
12 Practices Act, Bus. & Prof. Code §17000, et seq.

13 78. Defendants SCT's and Commission's acts,
14 individually and in conspiracy with each other and with City
15 and County, as described and set forth hereinabove include,
16 among other things, predatory pricing and price discrimination,
17 and are in violation of the California Unfair Practices Act.

18 79. The above-mentioned violations have directly and
19 proximately caused damage to plaintiff in its business and
20 property in substantial amounts which are as yet unknown, and
21 which will be set forth in full when ascertained.

22 80. The above-mentioned violations have also caused,
23 and will continue to cause, irreparable harm to plaintiff.
24 Unless defendants SCT and Commission are enjoined from engaging
25 in said anticompetitive actions and threatened actions,
26 plaintiff will continue to suffer great and irreparable harm.

27 WHEREFORE, plaintiff prays for relief as hereinafter
28 set forth.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for relief as follows:

A. For damages, trebled as appropriate, in such amounts as are proven;

B. For a declaration as to the inapplicability and/or unenforceability of each and every provision of Chapter 5.75 of the Sacramento County Code and Chapter 20.5 of the Sacramento City Code, insofar as those provisions are challenged above and have been or could be applied to plaintiff's activities; for a declaration of the respective rights and responsibilities of SCT and plaintiff vis-a-vis each other, and such other declarations as are appropriate in the circumstances;

C. For an order enjoining defendants, and each of them, from imposing restrictions or requirements upon plaintiff's activities which are improper and/or unreasonable, and from taking any action to restrain plaintiff's ability to engage in cable television activity;

D. For punitive damages against defendant Sacramento Cable Television;

E. For costs of suit, including reasonable attorney's fees; and

F. For such other and further relief as this Court deems proper.

//

//

//

Respectfully submitted,
FARROW, SCHILDHAUSE & WILSON

Dated: September 1, 1988

By:

Anne M. Ronan
Anne M. Ronan
2125 Oak Grove Road, Suite 120
P. O. Box 9383
Walnut Creek, California 94598-9383
(415) 945-0200

Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as provided for
in Rule 38, Federal Rules of Civil Procedure.

Dated: September 1, 1988

By:

Anne M. Ronan
Anne M. Ronan
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Attorneys for Plaintiff

PROOF OF SERVICE

I am a citizen of the United States, over the age of eighteen years and not a party to this action. I am employed in Contra Costa County, and my business address is 2125 Oak Grove Road, Suite 120, P. O. Box 9383, Walnut Creek, California 94598-9383.

On September 2, 1988, I served a FIRST AMENDED COMPLAINT on each of the following, by placing a true copy of the same enclosed in a sealed envelope with postage thereon fully prepaid in the United States First Class mail at Walnut Creek, California, addressed as follows:

Brenton A. Bleier, Esq.
1001 G Street, Suite 101
Sacramento, CA 95814

Michael J. Mahoney, Esq.
Baker & Hostetler
3200 National City Center
Cleveland, OH 44114

Executed on September 2, 1988, at Walnut Creek, California. I certify under penalty of perjury that the foregoing is true and correct.

Declarant

EXHIBIT II

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1 PACIFIC WEST CABLE COMPANY,
2 a California partnership,
3
4 Plaintiff,

5 v.

6 CITY OF SACRAMENTO, a municipal
7 corporation; COUNTY OF
8 SACRAMENTO, CALIFORNIA;
9 SACRAMENTO METROPOLITAN CABLE
10 TELEVISION COMMISSION; and

11 NO. CIVS-88-985 MLS/EM
12
13 PACIFIC WEST CABLE
14 COMPANY'S SEPARATE
15 STATEMENT OF FACTS IN
16 OPPOSITION TO SCT'S MOTION
17 FOR SUMMARY JUDGMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

14 PACIFIC WEST CABLE COMPANY,
15 a California partnership,

16 Plaintiff,

17 v.

18 CITY OF SACRAMENTO, a municipal
19 corporation; COUNTY OF
20 SACRAMENTO, CALIFORNIA;
21 SACRAMENTO METROPOLITAN CABLE
22 TELEVISION COMMISSION; and
23 SACRAMENTO CABLE TELEVISION, a
24 general partnership,

25 Defendants.

) NO. CIVS-88-985 MLS/EM

)
) PACIFIC WEST CABLE
) COMPANY'S SEPARATE
) STATEMENT OF FACTS IN
) OPPOSITION TO SCT'S MOTION
) FOR SUMMARY JUDGMENT

) Date: February 23, 1990

) Time: 9:00 a.m.

) Room: 3

23
24 Plaintiff, Pacific West Cable Company ("PacWest"),
25 submits this Separate Statement of Facts in response to the
26 Statement filed by defendant Sacramento Cable Television
27 ("SCT"). This Separate Statement is necessary because some
28 facts which SCT apparently believes are undisputed are very much

1 in dispute. Moreover, SCT has omitted and/or incompletely or
2 incorrectly summarized some of the relevant facts. This
3 Separate Statement is not intended to and does not identify all
4 of the facts over which there is a dispute between the parties.
5 Instead, it is merely intended to summarize some of the facts
6 relevant to PacWest's opposition to SCT's motion for summary
7 judgment. PacWest reserves the right to establish additional
8 facts at the trial.

9 I. THE CONSPIRACY TO PREVENT ACCESS TO THE
10 SACRAMENTO CABLE MARKET

11 A. The First Scheme - Barring Access Through
12 a Monopoly Franchise

13 1. In November and December 1981, the City of
14 Sacramento and the County of Sacramento each enacted essentially
15 identical ordinances to select who may construct and operate a
16 cable system in the Sacramento area. (SCT Ex. V at I-1.) Among
17 other things, these ordinances prohibited any person from
18 engaging in the cable television business within the Sacramento
19 area without having received a franchise. (SCT Ex. U at 5.)
20 No. one was permitted to speak or publish by means of cable
21 television within the Sacramento area without this franchise.
22 The City and County decided to limit the number of franchisees
23 to only one, thereby creating a monopoly. (PacWest Ex. 20.)

24 2. The issuance of the required franchise was
25 instituted by a bidding process known as a request for proposals
26 ("RFP"). (SCT Ex. U at 16.) The stated authority for this
27 procedure was the respective charters of City and County and the
28 powers granted them by Art. XI, §7 of the California
Constitution. (SCT Ex. U at 5.) Acceptance or rejection of an

1 applicant, however, was in the sole discretion of the issuing
2 authority. (SCT Ex. U at 18-19.) The franchise was to be
3 granted for a fixed period. (SCT Ex. U at 20.)

4 3. The franchise required the posting of performance
5 bonds and security deposits in the amount of \$2.5 million. (SCT
6 Ex. U at 78.) It also granted the franchisee a de facto
7 exclusive right to construct a cable system throughout the
8 Sacramento area. See *Pacific West Cable Co. v. City of*
9 *Sacramento*, 672 F.Supp. 1322, 1325 (E.D. Cal. 1987) ("*Pacific*
10 *West I*").

11 4. As early as February 1980, Raymond T. Butler, who
12 had served on many local commissions and knew the local

1 5. Before the bids were due in September 1982,
2 however, first ATC and then McClatchy Enterprises withdrew from
3 the bidding. (Id. at 84.) Butler then went to New York City to
4 solicit the participation of Cablevision of New York, since the
5 local individuals needed an entity with experience in management
6 and operations in the cable field. Cablevision of New York
7 agreed to join them and became the principal shareholder in a
8 new Sacramento Cablevision. (Id. at 89, 91-92.)

9 6. Sacramento Cablevision's bid was not accepted,
10 however. (Id. at 92.) The franchise was, instead, tentatively
11 awarded to United-Tribune Cable (PacWest Ex. 19 at ¶6; PacWest
12 Ex. 21 at 5), but problems developed with the final agreement
13 (PacWest Ex. 18 at 97) and United-Tribune Cable did not accept
14 the franchise as actually offered. (PacWest Ex. 19 at ¶7;

Pacific West I, 672 F.Supp. at 1325.) 1/

1 franchise for the operation of the cable television system and
2 to enforce its terms on a contractual basis. (SCT Ex. U at 13;
3 *Pacific West I*, 672 F.Supp. at 1324.)

4 8. Following the breakdown in negotiations for a
5 final franchise with United-Tribune Cable, a second RFP was
6 issued by the Commission in July 1983. (PacWest Ex. 19 at ¶7;
7 SCT Ex. V at I-1.) The local citizens who had backed Sacramento
8 Cablevision then revived River City, and formed a partnership
9 with Cablevision of New York and Scripps-Howard for a new bid
10 under the name of Cablevision of Sacramento ("Cablevision").
11 (PacWest Ex. 18 at 91-97.)

12 9. In the meantime, PacWest was formed in August
13 1983 for the purpose of constructing and operating a cable
14 television business in the Sacramento area. (PacWest Ex. 22 at
15 ¶2.) In that same month, PacWest obtained business licenses
16 which indicated that the nature of its business was cable
17 television, sought pole attachment services from Pacific
18 Telephone and Telegraph Company, which were denied because of
19 its lack of a franchise from the Governmental Entities, and
20 requested permission from the Governmental Entities to build and
21 operate a cable system in the Sacramento area, which was also
22 denied. (*Pacific West I*, 672 F.Supp. at 1325, PacWest Ex. 23 at
23 2; PacWest Ex. 24.)

24 10. In view of the Governmental Entities' refusal to
25 issue the essential authorization, PacWest filed suit ("PacWest
26 I case") against County and City of Sacramento in the United
27 States District Court in Sacramento on September 9, 1983,
28

1 alleging, inter alia, violation of its constitutional rights.
2 (PacWest Ex. 23 at 2; *Pacific West I*, 672 F.Supp. at 1325.)

3 11. On September 20, 1983, Cablevision submitted a
4 proposal in response to the Governmental Entities' second RFP to
5 be the sole cable television operator in the Sacramento area.
6 (PacWest Ex. 23 at 3.) On the same day, PacWest also responded
7 to the second RFP. (*Pacific West I*, 672 F.Supp. at 1325;
8 PacWest Ex. 24.) PacWest refused to pay the \$45,000,
9 nonrefundable filing fee for the privilege of competing for the
10 right to speak and publish, however, and stated its objections
11 to various other requests of the Governmental Entities in their
12 RFP, noting in particular that "both the 'Draft Resolution' and
13 the ordinances appear more akin to contracts than to regulatory
14 enactments." (PacWest Ex. 24.) PacWest also specifically
15 stated that it would "respect and obey each and every
16 requirement contained in the above ordinances and/or in the
17 'Draft Resolution' for which there is a proper and lawful police
18 power basis." (Id.)

19 12. In November 1983, Cablevision was tentatively
20 selected as the initial franchisee by the County and City of
21 Sacramento and the Cable Commission--with the express approval
22 of the City and County--entered into a franchise contract with

1 compete with SCT in Sacramento County. (*Pacific West I*, 672
2 F.Supp. at 1328.) A \$250,000 ("award fee") was charged for the
3 issuance of the franchise. (SCT Ex. X at I-4.)

4 13. In the Spring of 1984, PacWest's request for
5 permission to place its conduits in trenches opened for other
6 purposes, which is a common practice to eliminate unnecessary
7 trenching, was denied by the Governmental Entities, and
8 Cablevision accelerated its undergrounding efforts to complete
9 the required undergrounding before PacWest could obtain access
10 to the market. (PacWest Ex. 23 at 5-6; *Pacific West I*, 672
11 F.Supp. at 1325.) This action was contrary to sound business
12 practices. (PacWest Ex. 23 at 4-5.)

13 14. By late 1984, it was clear that Cablevision of
14 New York was not going to provide its promised \$34 million share
15 of the necessary equity funding, and Scripps-Howard took over
16 its share of the franchise. (PacWest Ex. 25 at 61, 68, and Ex.
17 3.) Scripps-Howard also sought modifications in the franchise
18 agreement (PacWest Ex. 25 at 49), and ultimately was granted
19 modifications by the Commission which resulted in it saving some
20 \$20 million in reduced commitments. (*Id.* at 114 and at Ex. 3.)
21 Cablevision of Sacramento became, in the process of these
22 changes, Sacramento Cable Television ("SCT"). (*Pacific West I*,
23 672 F.Supp. at 1325 n.3.)

24 15. Besides the financial concessions, the franchise
25 agreement, the ordinance, and the grantee agreements were also
26 all amended to grant the "Commission the exclusive right to act
27 . . . on all matters relating to Programming Resources" (SCT Ex.
28 X at 2), the effect of which was to transfer exclusive control

1 to file a lawsuit against SCT on January 9, 1986, based on
2 anticipatory breach of those agreements. (PacWest Ex. 27 at 13.

3 18. In January 1986, PacWest filed a second action
4 ("PacWest II Case") against SCT and the Governmental Entities to
5 in state court. (SCT Ex. N.)

6 **B. The Second Scheme--Denying PacWest
The Right It Had Won to Enter the Market**

7 19. In June 1987, in the PacWest I case, the jury
8 returned the following findings favorable to PacWest's
9 constitutional position: that the Governmental Entities had not
10 left open "ample alternative means of communication"; that
11 PacWest had the financial and technical capabilities to
12 construct and operate a cable system; that there was sufficient
13 physical space for all cable companies who should want to use
14 the necessary public rights of way and utility easements; that
15 the construction and operation of a cable system does not cause
16 significant disruption in the use of public property,
17 significant safety hazards to the public or workers, significant
18 interference with the use of private property, or significant
19 noise, visual clutter, aesthetic and/or environmental problems;
20 that head-to-head competition was feasible in Sacramento and
21 that the Governmental Entities' reliance on natural monopoly was
22 a sham to promote cash payments and in-kind services and to
23 obtain increased campaign contributions for local elected
24 officials; that the RFP process encouraged provision of access
25 channels and various grants and that the Governmental Entities
26 were motivated to require such benefits to obtain increased
27 political influence for local elected or appointed officials or
28

1 to favor their political supporters; that the RFP process did
2 not result in "better" cable television service in terms of
3 technology, capabilities and channel capacity; and that the RFP
4 did not promote the public's interest in the technical
5 qualifications or background of an applicant. (*Pacific West I*,
6 672 F.Supp. at 1342.)

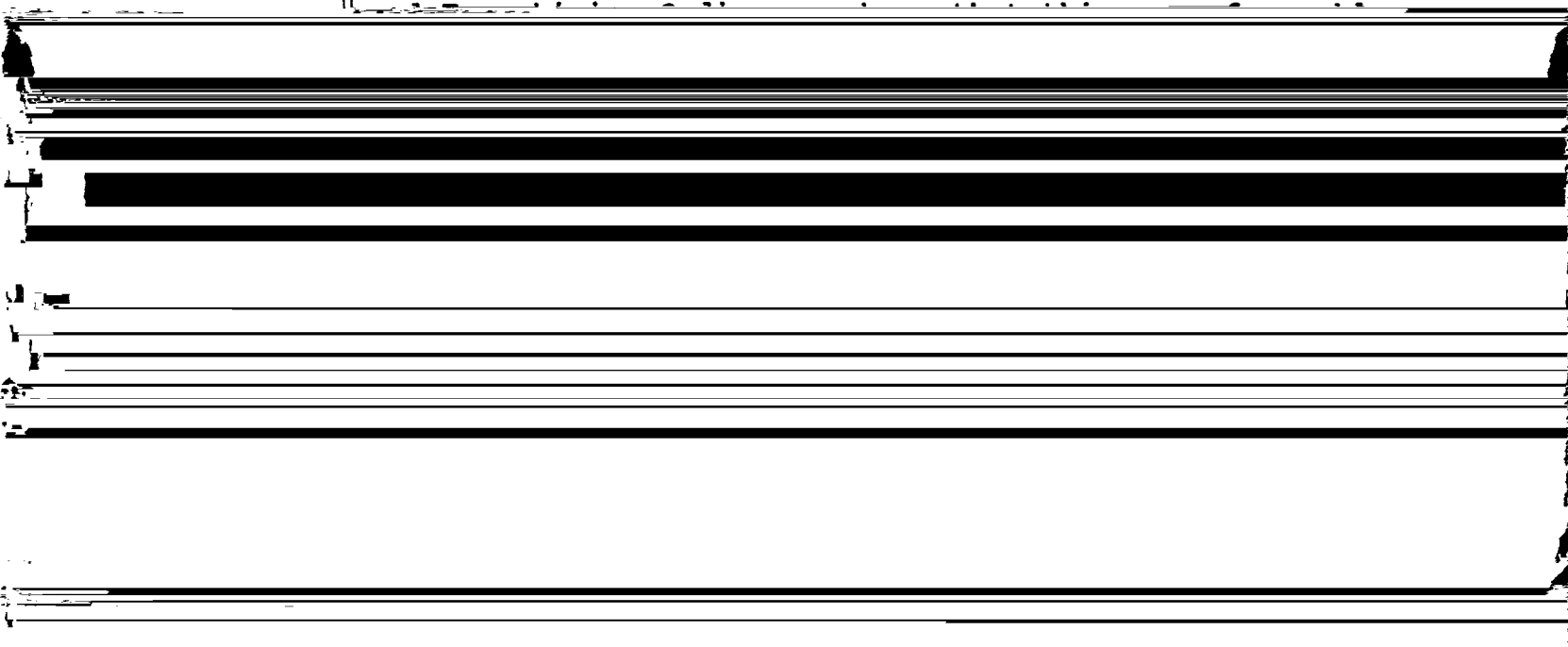
7 20. On or about July 6, 1987, in express reaction to
8 the adverse jury verdicts, the City and County enacted identical
9 ordinances entitled, in each case, "Cable Television Licensing
10 Ordinance" (hereinafter "Licensing Ordinance"). (SCT Ex. EE at
11 29-30; and see *PacWest Ex. 28* at 1-2.) The City enacted this
12 ordinance as Chapter 20.5 of the Sacramento City Code. (All
13 references herein are to the County Code (SCT Ex. EE) section
14 numbers.) The County enacted this ordinance as Chapter 5.75 of
15 the Sacramento County Code. Pursuant to this ordinance,
16 desirous cable television companies, such as *PacWest*, could
17 obtain one or more "cable television licenses" only by meeting
18 certain burdensome and unreasonable application requirements.
19 (*Id.* at 5-6.) Such licenses are issued and administered by the
20 Cable Commission. *Id.*

21 21. After passing the Licensing Ordinance, the
22 Governmental Entities publicly acknowledged that SCT had
23 "dramatic economic advantages" under the Franchise Ordinance
24 that were not available to *PacWest* under the Licensing
25 Ordinance. (*PacWest Ex. 28* at 4-5 of attached Summary of Legal
26 Evaluation.)

27 22. In December 1987, the Governmental Entities, upon
28 SCT's complaints regarding the entry of SCT as a competitor,

1 entered into a further agreement with SCT, embodied in part in
2 the December 7, 1987 Memorandum of Understanding ("MOU"). (SCT
3 Ex. HH.) As part of this agreement, SCT paid to City, County
4 and Commission approximately \$15 million, in exchange for which
5 SCT was permitted to conduct its cable television business on
6 substantially more favorable terms and subject to fewer
7 restrictions than the Governmental Entities were imposing on
8 PacWest under the terms of the Licensing Ordinance. (See SCT
9 Ex. HH and Ex. II; with SCT Ex. EE and SCT Ex. KK.) Under the
10 MOU, SCT was permitted to proceed under all sections of the
11 Licensing Ordinance it liked while excused from those it did not
12 wish to abide by. (PacWest Ex. 30; PacWest Ex. 31; and see SCT
13 Ex. HH at 8.) These more favorable terms were afforded to SCT
14 despite the fact that the MOU itself acknowledges that SCT and
15 PacWest are similarly situated for purposes of equal protection
16 analysis. (SCT Ex. HH at 10.)

17 23. A comparison of the status afforded PacWest under
18 the Licensing Ordinance and that afforded to SCT under the MOU



1 (a) PacWest's "license" is for a term of only
2 five years, while SCT, under the MOU, now has a term of forty
3 years, thus providing it sufficient time to recoup any losses
4 suffered in the short term due to its predatory pricing
5 practices. (SCT Ex. KK at 2; SCT Ex. HH at 5-6; SCT Ex. II at
6 8.)

7 (b) PacWest must pay a fee of 5% of its gross
8 revenues, while SCT was relieved of such obligation for six
9 years. (SCT Ex. EE at 21-22 and SCT Ex. HH at 4.) PacWest must
10 comply with extensive reporting requirements, while SCT had no
11 such obligation for six years. (Id.)

12 (c) Plaintiff was required to complete a new
13 license application to the Cable Commission every time it places
14 conduit in joint utility trenches. SCT was under no such
15 obligation. Each individual license application (and PacWest
16 made over 150 such applications) required expensive, duplicative
17 and needlessly repetitive work by PacWest. (See SCT Ex. EE at
18 5-6; PacWest Ex. 29; and §II, infra.)

19 (d) The bonding requirements imposed on PacWest
20 (which SCT specifically sought to avoid for itself [PacWest Ex.
21 30]) are much more burdensome than those on SCT. If the formula
22 for determining the amount of bond required of PacWest under the
23 Licensing Ordinance was applied to SCT, SCT's bonding
24 requirement would have amounted to over \$70 million. However,
25 SCT was required to post a bond of only \$2.5 million to build
26 the entire County. (PacWest Ex. 14; SCT Ex. EE at 24; SCT Ex. U
27 at 78; SCT Ex. II at 10.)
28 e